

authority to waive forum fees and grants the arbitrators the discretion to apportion all fees and charges assessed on the parties other than hearing session deposits.

The Lipner Letter objects to Section 46(b)(8)(C), which provides that one purpose of the administrative conference is to develop a statement of the legal authorities related to the matters in dispute to be brought to the attention of the arbitrators. The Lipner Letter views this provision as transforming the arbitration process into one that is more akin to litigation. The Commission believes that this provision recognizes that legal issues are argued routinely in arbitration and that this provision may assist parties in formulating and assessing the strength of their claims. It is a reasonable approach for the NASD to adopt.

Both the NELA Letter and the Lipner Letter object to Section 46(f)(3), which permits arbitrators to rule on dispositive motions, such as motions to dismiss on any grounds, including the applicability of a statute of limitations, or motions for summary judgment. Both commenters argue that permitting such motions and the attendant legal briefing is inconsistent with the nature of the arbitration process. The Commission believes that parties should be cognizant of this feature of the large and complex case rules before they agree to arbitrate pursuant to the large and complex case rules. The Commission believes that the pamphlet will alert parties to this provision. As noted above, parties will be able to modify this provision under an agreement under Section 46 (a)(2) and (a)(3), and, if no agreement is reached, then the large and complex arbitration rules will not govern the arbitration of the matter.

The NELA Letter objects to Section 46(f)(2), which limits depositions and interrogatories to determining and preserving testimony and facts relevant to the determination of the matter, rather than for conducting discovery. NELA believes that not permitting depositions for discovery is a significant disadvantage to employees and causes the arbitration process to be skewed in favor of employers. The Commission is not unmindful of the concerns expressed by NELA. However, the Commission believes that parties may either modify these procedures through the agreement reached under Section 46 (a)(2) and (a)(3) to permit depositions for purposes of discovery, or failing agreement, may arbitrate in accordance with the rules governing arbitration elsewhere in the Code. Moreover, experience with this provision of the pilot rules can be evaluated in the event

that the NASD determines to propose these rules for permanent inclusion in the Code. The Commission also intends to monitor cases arbitrated under the large and complex case rules to determine whether parties are being disadvantaged by the limited scope of discovery.

IV. Discussion and Findings

The Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act¹⁷ because it may encourage the arbitration of large and complex cases in a manner consistent with the objective of a just, efficient and cost-effective resolution of those cases, and will provide parties with the flexibility to formulate their own procedures. The flexibility will serve the public interest by permitting parties to tailor arbitration proceedings in a manner which enhances their ability to pursue their claims.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, the File No. SR-NASD-94-10 be, and hereby is approved for a one year period beginning May 2, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

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Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by New York Stock Exchange, Inc., Relating to Domestic Listing Standards

January 31, 1995.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on January 18, 1995, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

¹⁷ U.S.C. 78o-3.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NYSE is proposing amendments to its domestic listing standards. These listing standards are contained in Paragraph 102.01 of the Exchange's *Listed Company Manual*. The text of the proposed rule change is available at the Office of the Secretary, NYSE, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to create alternatives for two existing Exchange listing standards and to amend two additional standards. According to the Exchange, the NYSE already has, and intends to maintain, the highest listing requirements among U.S. markets. Current listing requirements measure, among other things, demonstrated earning power and shareholder distribution, as well as tangible net worth and market capitalization of publicly-held shares. The rule change would provide alternatives to the existing demonstrated earning power and shareholder distribution tests. In addition, the proposal would increase the existing requirements for tangible net worth and public market capitalization.

Demonstrated Earning Power

Under the Exchange's demonstrated earning power standard, the existing requirement calls for:

| | |
|---|-------------|
| Demonstrated earning power—income before federal income taxes and under competitive conditions: | |
| Latest fiscal year | \$2,500,000 |
| Each of the preceding two fiscal years | \$2,000,000 |

| | |
|--|-------------|
| or Demonstrated earning power—income before fed- eral income taxes and under competitive conditions: Aggregate for last three fis- cal years together with | \$6,500,000 |
| A minimum in most recent fiscal year (All three years must be profitable) | \$4,500,000 |

The NYSE believes that there are substantial companies, in some cases multi-billion dollar enterprises, that do not manage their business on the basis of reported income. In order to provide an opportunity for these companies to list, the Exchange is proposing an alternate demonstrated earning power test for companies with a market capitalization of not less than \$500 million and revenues of not less than \$200 million in the most recent fiscal year. These companies would be in a position to qualify for listing under an alternate listing standard based on net income adjusted for the cash effects of investing or financing cash flows.

The proposed standard would call for aggregate adjusted net income of not less than \$25 million for the last three years, with each year showing a positive amount. Reported net income (before preferred dividends) would be adjusted, under the new standard, to remove the effects of all items whose cash effects are "investing" or "financing" cash flows as determined pursuant to Paragraph 28(b) of the Financial Accounting Standards Board's Statement of Financial Accounting Standards No. 95, "Statement of Cash Flows" (depreciation, amortization of good will and gains or losses on sales of property, plant and equipment are examples of such items). The adjustment to net income with respect to the cash effects of (1) discontinued operations, (2) the cumulative effect of an accounting change, (3) an extraordinary item or (4) the gain or loss on extinguishment of debt would be limited to the amount charged or credited in determining net income for the period.

Shareholder Distribution

The Exchange's current shareholder distribution requirement calls for a minimum of:

| | |
|--|---------|
| Number of holders of 100 shares or more or of a unit of trading if less than 100 shares | 2,000 |
| or Total stockholders together with | 2,200 |
| Average monthly trading vol- ume (For most recent six months) | 100,000 |

The proposed rule change would add a distribution standard for companies whose shares are very actively traded as an alternative to the existing shareholder distribution tests. Under the new alternative standard, a company with average monthly share trading volume of 1 million shares (for the most recent 12 months) could qualify for listing with 500 total shareholders. The Exchange believes that a company with this demonstrated level of trading activity would be appropriate for trading in the Exchange's agency-auction market as long as there are at least 500 shareholders.

Market Value and Net Tangible Assets

In addition to the two alternate standards proposed above, the Exchange is proposing to increase the existing requirements for both aggregate market value of publicly-held shares and net tangible assets from the current \$18 million to \$40 million. These requirements previously were adjusted in 1984. The NYSE views the increase in these standards as appropriately reflecting the attributes of the kinds of companies that the Exchange wants to attract, and expects that such standards would help to maintain the quality of the NYSE list.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on the proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such other period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR-NYSE 95-01 and should be submitted by February 28, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,
Deputy Secretary.

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